

OCT 05 2007

SECRETARY, BOARD OF
OIL, GAS & MINING

Steven A. Wuthrich appeared as counsel for Wright/Garff Resources, and Ed Rogers testified as a witness for Wright/Garff. Ronald S. George appeared as counsel for Respondent Star Stone Quarries, Inc., and Lon Thomas testified as a witness for Star Stone. Steven F. Alder, Assistant Attorney General, appeared as counsel for the Division of Oil, Gas and Mining (the "Division"). Darren Haddock, Environmental Manager/Permit Supervisor, and Susan White,

Environmental Manger/Mining Program Coordinator, testified as witnesses for the Division. Michael S. Johnson, Assistant Attorney General, represented the Board.

NOW THEREFORE, the Board, having fully considered the testimony adduced and the exhibits received at the hearing¹, being fully advised, and good cause appearing, hereby makes and enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Notices of the time, place, and purpose of the July 25, 2007 hearing were mailed to all interested parties, and were duly published in newspapers of general circulation pursuant to the requirements of Utah Administrative Code ("U.A.C.") Rule R641-106-100 (2005). Copies of the Request for Agency Action were likewise mailed to all interested parties pursuant to U.A.C. Rule R641-104-135.

2. Petitioner Wright/Garff Resources, L.L.C. ("WG") is a Utah limited liability company and is the owner of 95.5 percent of the mineral interest underlying the area known as Lot 38 (see below). The Bureau of Land Management own the mineral estate to an approximately 3.5 acre portion of Lot 38.

3. Lon Thomas and Associates, Inc., a Utah corporation, owns the surface estate to Lot 38. Lon Thomas and Associates, Inc. has leased the surface estate of Lot 38 to Respondent Star Stone Quarries, Inc. ("SSQ"), a Utah corporation and affiliated entity.

4. The division of surface and mineral ownership set forth in the preceding two paragraphs was represented by the parties at the hearing to have been confirmed through a

¹ The post-hearing affidavits of the parties concerning the rock crusher were submitted after the close of evidence and were not considered by the Board. The issue addressed in those affidavits was not critical to the Board's decision.

January 13, 1997 judgment entered in the Third Judicial District court in Civil No. 94-03-00111.

5. On November 6, 2000, the Division approved a notice of intention ("NOI") to commence large mining operations submitted by SSQ (this approved NOI is hereinafter referred to as the "Permit"). SSQ submitted the NOI to mine sandstone/building stone. The Permit covers approximately 40 acres, of which SSQ may disturb approximately 27 acres. The SSQ permit covers a parcel of land referred to by the parties as Lot 38.

6. In 1996, and again in 2000, WG leased its mineral estate to SSQ. SSQ also obtained a mineral lease from the BLM covering the 3.5-acre portion of Lot 38 in which WG has no interest. During the term of WG's lease to SSQ, SSQ excavated a quarry to extract minerals from the WG mineral estate. The extraction activities created a highwall, pad, and waste dump which will have to be reclaimed.

7. On October 31, 2005, the mineral lease granted SSQ by WG terminated and was not renewed. While the Permit allows SSQ to extract minerals from that portion of the permit area covered by WG's mineral estate, due to the loss of the underlying lease, SSQ no longer has that right. SSQ has not filed any Notice of Intention to Revise Large Mining Operations to reflect the loss of its lease from WG.

8. Under the Permit and SSQ's lease from the BLM, SSQ continues to have the right to extract minerals from the 3.5-acre BLM parcel. While SSQ's lease of the WG minerals has terminated, the Permit in its present form still allows SSQ to conduct other "mining operations" on the surface estate overlying the WG minerals. SSQ presently stores, splits and palletizes rock on that acreage.

9. In August of 2006, WG submitted a small mine NOI to develop its own mineral

estate. WG wishes to mine the quarry previously excavated by SSQ and to remove certain piles of previously mined materials located on the site. The five acres WG proposes to mine in its NOI are located on Lot 38 and entirely within the boundaries of the existing SSQ Permit.

10. Because SSQ already holds a permit covering Lot 38, the Division declined to process the WG NOI. WG appealed this determination, asking the Division to withdraw or modify the SSQ Permit to accommodate the WG proposal. WG appealed this decision informally to the Division Director. On May 3, 2007, the Division Director, pursuant to R647-5-105, converted the appeal from an informal appeal to a formal appeal to be heard by the Board.

11. In addition to the pre-existing SSQ Permit covering the same ground, the Division noted several other problems with the WG NOI. First, the five acres covered by the WG NOI are comprised of several non-contiguous areas, complicating both access to these noncontiguous areas as well as the orderly carrying out of reclamation responsibilities on the noncontiguous areas and on the connecting property under the existing SSQ Permit. For these reasons, as noted by the Division, the existing WG NOI does not present a realistic mine proposal that would allow for adequate reclamation.

12. The Division has further noted that WG had initially stated it was unwilling to assume the entire reclamation responsibility for its proposed mine site and would require SSQ to reclaim its share of the disturbance. At the hearing, however, WG amended its position and stated that it would indeed assume the entire reclamation responsibility for its proposed mine site regardless of who was responsible for disturbances thereon.

13. All parties agree that dual permitting (the granting of a permit to WG which overlaps the existing SSQ Permit) is not feasible in this case due to, among other factors,

hostility between WG and SSQ which would preclude the kind of cooperation necessary for dual permitting to work.

14. SSQ is presently dumping material over the highwall of the quarry with the intention of using the material for reclamation. These actions will make it difficult, if not impossible, for WG to mine the existing quarry under any approved NOI.

CONCLUSIONS OF LAW

15. Due and regular notice of the time, place, and purposes of the July 25, 2007 hearing was given to all interested parties in the form and manner and within the time required by law and the rules and regulations of the Board. Due and regular notice of the filing of the Request for Agency Action was given to all interested parties in the form and manner and within the time required by law and the rules and regulations of the Board.

16. The Board has jurisdiction over the parties and subject matter of this Request for Agency Action pursuant to Chapters 6 and 8 of Title 40 of the Utah Code Annotated, and has the power and authority to make and promulgate the order herein set forth.

17. The mineral estate is recognized to be the dominant estate, with the surface estate being subservient to the degree necessary to allow the mineral estate owner to extract his/her minerals. Thus, as the owner of the mineral estate, WG possesses the right to make certain uses of the surface estate as reasonably necessary to the development of its minerals. Such right to use the surface to develop the mineral estate was recognized by the Third District Court in the January 13, 1997 summary judgment ruling in the litigation between SSQ and WG referenced in paragraph 4 of the Findings, above.

18. The Division has a duty under the Utah Mined Land Reclamation Act and

implementing regulations to ensure that a WG NOI, if approved, will allow for full reclamation. Hence, if in the Division's judgment WG's previously-submitted NOI is not conducive to adequate reclamation given its inclusion of noncontiguous areas, and is unrealistic in its failure to address disturbances associated with access to the site, the Division has the authority to require changes to such NOI prior to approval.

19. Utah Code Ann. §40-8-18(1)(a) requires that "an operator conducting mining operations under an approved notice of intention shall submit to the division a notice of intention when revising mining operations." *See also* Utah Admin. Code R647-4-118.1. Because SSQ's mineral lease from WG terminated and SSQ no longer extracts minerals from the WG mineral estate, its mining operations have changed significantly and it must under the statute submit a Notice of Intention to Revise Large Mining Operations. The revision shall incorporate changes necessary to accommodate WG's utilization of its own mineral estate through its proposed mining activity.

20. Any failure by SSQ to hereafter file a Notice of Intention to Revise Large Mining Operations as required by Utah Code Ann. §40-8-18(1)(a) and by this Order will constitute a violation of the requirements of Chapter 8 of Title 40 and may subject SSQ to possible civil penalties pursuant to Utah Code Ann. §40-8-9.1, cessation orders pursuant to Utah Code Ann. §40-8-9(3)(c), and criminal charges pursuant to Utah Code Ann. §40-8-9(1).

21. While SSQ has a continuing right to the benefits and use of its Permit, that permit was issued subject to, and remains subject to, the controlling statutes and regulations. *See* Utah Code Ann. §40-8-17(1). As discussed below, such statutes and regulations provide for the Division's authority to require a revision/modification of the Permit when warranted.

22. The Division has “jurisdiction and authority over all persons and property, both public and private, necessary to enforce” the provisions of the Utah Mined Land Reclamation Act. Utah Code. Ann. 40-8-5(1)(a). Additionally, the regulations expressly provide that “the Division may review [a] permit and require updated information and modifications when warranted.” Utah Admin. Code §647-4-102. In addition, the Division possesses implied powers necessary to carry out these enumerated powers. *See Bennion v. ANR Production Co.*, 819 P.2d 343, 350 (Utah 1991). *See also* cases cited in SSQ’s Reply to Brief of Wright/Garff Resources at 2-3. The Division therefore has the authority, in light of the termination of SSQ’s lease and WG’s intention to mine its own minerals, to require a modification of the SSQ Permit to reflect changed circumstances and to accommodate any NOI filed by WG which the Division might approve.

23. Such modification will allow WG to develop its own mineral estate while leaving intact SSQ’s ability to mine the minerals from the 3.5-acre BLM parcel and to continue to use the great majority of the remainder of Lot 38 within the existing Permit area for its splitting, crushing, storing, selling and other activities, as well as to conduct necessary reclamation activities.

ORDER

IT IS THEREFORE ORDERED that:

A. WG’s Petition is granted in part, and denied in part, as follows:

B. The Board upholds the Division’s refusal to process the existing WG NOI both because of the existence of the conflicting SSQ Permit and because of the problematic, non-contiguous nature of the proposed operations. The issue of the conflicting SSQ Permit can be

addressed through a revision of that Permit as discussed in greater detail below. Before the SSQ Permit can be revised to accommodate WG's proposed plan, however, WG must submit a new NOI which the Division deems adequate which proposes a logical mine plan covering contiguous areas and which ensures that adequate reclamation is possible. The new NOI shall accommodate continued operations on SSQ's large mine permit.

C. In accordance with its representations at the hearing in this matter, WG shall assume full responsibility for reclaiming all disturbed areas within the area covered by its NOI regardless of whether it, SSQ, or any other party created such disturbances. WG must present to the Division appropriate surety guaranteeing that it will perform the reclamation for its proposed operations. Once the Division is satisfied with WG's form and amount of surety, it will release SSQ's bond for the area covered by the WG NOI.

D. The Board orders, and directs the Division to require pursuant to its authority discussed in paragraph 22, above, that SSQ file a Notice of Intention to Revise Large Mining Operations to modify its Permit to reflect the loss of its mineral lease from WG and to make accommodation for WG's use of the acreage covered by any amended WG NOI approved by the Division. SSQ shall make such filing within 45 days of the date of the Division's determination that WG has submitted an adequate NOI as discussed in paragraph B, above. The Division shall notify SSQ when this has occurred. In the event SSQ fails to file such a Notice, the Division is directed to use its powers under Utah Code Ann. §§40-8-9(3) and 9.1 (concerning civil penalties and cessation orders) to compel compliance. The Board further notes that failure to file the Notice as required by statute and this Order may constitute a class B misdemeanor pursuant to Utah Code Ann. §40-8-9(1). In addition to employing these penalties and sanctions, in the event

SSQ fails to file an appropriate revision document, the Division may petition the Board to consider imposing other sanctions, including withdrawal/revocation of the SSQ permit, pursuant to the Board's general powers.

E. The Board orders, and directs the Division to require, that SSQ temporarily cease dumping materials over the highwall of the quarry or any other portion of the proposed WG mine site until any new NOI filed by WG is acted upon. If approval of a WG NOI results in the highwall being included within the area of a WG permit, and reclamation responsibilities for such highwall are assumed by WG, SSQ shall not thereafter engage in any further dumping of material over the highwall.

F. The Board makes no ruling on ownership of existing rock piles, boulders or other already-mined minerals which may be located on the subject property. Any dispute regarding ownership of such property must be resolved by the parties in state court or another tribunal with jurisdiction over such ownership issues.

G. The Board has considered and decided this matter as a formal adjudication, pursuant to the Utah Administrative Procedures Act, Utah Code Ann. §§ 63-46b-6 through -10, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code R641.

H. This Findings of Fact, Conclusions of Law, and Order ("Order") is based exclusively upon evidence of record in this proceeding or on facts officially noted, and constitutes the signed written order stating the Board's decision and the reasons for the decision, as required by the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-10, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code

R641-109; and constitutes a final agency action as defined in the Utah Administrative Procedures Act and Board rules.

I. Notice of Right of Judicial Review by the Supreme Court of the State of Utah. As required by Utah Code Ann. §63-46b-10(e) to -10(g), the Board hereby notifies all parties to this proceeding that they have the right to seek judicial review of this Order by filing an appeal with the Supreme Court of the State of Utah within 30 days after the date this Order is entered. Utah Code Ann. § 63-46b-14(3)(a) and -16.

J. Notice of Right to Petition for Reconsideration. As an alternative, but not as a prerequisite to judicial review, the Board hereby notifies all parties to this proceeding that they may apply for reconsideration of this Order. Utah Code Ann. § 63-46b-13. The Utah Administrative Procedures Act provides:

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Utah Code Ann. § 63-46b-13.

The Rules of Practice and Procedure before the Board of Oil, Gas and Mining entitled “Rehearing and Modification of Existing Orders” state:

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Utah Admin. Code R641-110-100.

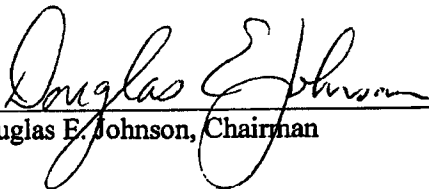
See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. The Board hereby rules that should there be any conflict between the deadlines provided in the Utah Administrative Procedures Act and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the aggrieved party may seek judicial review of the order by perfecting an appeal with the Utah Supreme Court within 30 days thereafter.

K. The Board retains exclusive and continuing jurisdiction of all matters covered by this Order and of all parties affected thereby; and specifically, the Board retains and reserves exclusive and continuing jurisdiction to make further orders as appropriate and authorized by statute and applicable regulations.

L. The Chairman’s signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ENTERED this 5 day of October, 2007.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING



Douglas E. Johnson, Chairman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER via United States mail, postage prepaid, this
10 day of October, 2007, to the following:

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